BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA M. WALLACE	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,034
SITEL OF NORTH AMERICA	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals from a June 23, 1999 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard which ordered respondent to provide medical treatment but denied claimant's request for temporary total disability compensation.

ISSUES

Respondent contends the ALJ exceeded his jurisdiction by granting medical benefits for an injury which did not arise out of and in the course of claimant's employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the preliminary hearing Order should be affirmed.

Claimant was injured on November 21, 1998 while standing outside the office building on a cigarette break. Someone opened the door from inside the building and the door struck claimant causing injuries.

Respondent leases a suite of offices in a building owned by the lessor. On appeal, respondent argues that because claimant was on break when the accident occurred and not on the employer's premises, the injury is non-compensable. Respondent cites the Board's decision in Curless v. Southern Education Counsel, WCAB Docket No. 233,051 (Nov. 1998) as being on point with its theory in this case and argues that the Curless case should be followed to find the claim here non-compensable.

Claimant, on the other hand, argues she went to an area specifically designated by respondent as a "smoking area" and that her injuries should be compensable under the theory set forth in Hilyard v. Lohmann-Johnson Drilling Co., 168 Kan. 177, 211 P.2d 89 (1949), which

determined that custom and usage by a claimant can result in a workers compensation recovery despite the fact the claimant's activities at the time of the injury were not directly related to the employment.

The "going and coming" rule in K.S.A. 44-508(f) is generally applied when analyzing cases involving a claimant either going to work at the beginning of the day or shift or leaving work at the end of the day or shift. Respondent is correct in pointing out that the Board, as in Curless, has also applied the "going and coming" rule as well as premises exception to that rule when analyzing whether lunch break injuries are compensable. The case at bar, however, does not involve a lunch break.

Since the duration of lunch breaks is generally long enough to allow employees to leave the premises and therefore be out of their employer's control, Larson's and most jurisdictions analyze lunch break cases using the "going and coming" rule and the "premises exception".[1] But injuries suffered during shorter coffee or rest breaks are generally treated differently. The Board has likewise employed a different analysis for breaks than for injuries occurring during lunch periods.[2] Larson's notes that many jurisdictions find that the duration of a break is so short that the employment relationship is not interrupted. Therefore, injuries occurring during breaks are compensable as work related. A general rule given by Larson's regarding off premises coffee or rest breaks is:

> If the employer, in all circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.[3]
>
> The fact that the coffee break or rest period is a paid one, or for any other reason might be presumptively within the course of employment, does not of course mean that anything that happens during that span of time is compensable. If the employee uses the interval, not for its basic purpose of rest and refreshment, but for personal errands, such as cashing a check at a bank, or doing some shopping for Christmas, or getting a tuberculin shot checked, the employee leaves the scope of employment if the deviation is such as to be called substantial. On the other hand, a swim during a coffee break has been held not to interrupt the course of employment, in part because the refreshing effects of the swim would benefit the employer as well as the employee by enhancing the employee's efficiency.[4]

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[1] See 1 Larson's Workers' Compensation Law, § 13.05 (1999).

[2] See, e.g., Vaughn v. City of Wichita, WCAB Docket No. 184,562 (Feb. 1998); Timmons v. Western Resources, WCAB Docket No. 227,781 (Dec. 1997).

[3] Larson's at § 13.05, page 13-62.

[4] Larson's at § 13.05, page 13-66.

Further, Larson's notes that "if the employees during their coffee break are expected to go to a particular off premises place, the element of continued control is adequately supplied."[5] Cigarette breaks are considered analogous to coffee breaks and are specifically discussed by Larson's in the context of the personal comfort doctrine. When mentioning the personal comfort doctrine[6] the vast majority of cases cited in Larson's hold that smoking on the job does not constitute a departure from the employment. Many of the older cases found smoking to be one way employees relieved work stress and coped with the work day. Smoking was therefore found to benefit both the employee and the employer. The Board has likewise applied the personal comfort doctrine to find injuries that occurred while the employee was on break to be compensable.[7]

The Curless case involved an off premises lunch break injury. The Board utilized the "going and coming" rule to determine the injury non-compensable. The premises exception did not apply. There is a difference, however, between off premises lunch breaks, for which the "going and coming" rule applies, and off premises rest, coffee or cigarette breaks where the "going and coming" rule does not apply but which instead are analyzed under other doctrines such as the personal comfort doctrine, mutual benefit and right of control tests. The facts in Curless are not analogous to the facts in this case. The only similarity between the two cases is that both claimants were injured in a common area of a building where their employers leased space. In this case claimant's break was quite short, she was in an area designated by respondent as a smoking area when the injury occurred and claimant had told her supervisor she was going for a cigarette break. Clearly, under the personal comfort doctrine this claim would be compensable and the Board concludes that, under the facts of this case, the personal comfort doctrine should control.

WHEREFORE, the Appeals Board finds that the Order of Administrative Law Judge Steven J. Howard dated June 23, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

c: Timothy A. O'Keefe, Iola, KS
Kristine A. Purvis, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

[5] Larson's at 13-64.

[6] Larson's § 21.04.

[7] See Riley v. Graphics Systems, Inc., WCAB Docket No. 237,773 (Dec. 1998). See also, 1 Larson's Workers' Compensation Law, § 21.20 (1996).